

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

State of Oklahoma, et al.,	)	
	)	
Plaintiffs,	)	<b>Civil No. 05-CV-0329 GKF-SAJ</b>
	)	
v.	)	
	)	
Tyson Foods, Inc., et al.,	)	
	)	
Defendants.	)	
	)	

**THE CARGILL DEFENDANTS’ MOTION FOR LEAVE TO FILE SURREPLY**  
**IN OPPOSITION TO MOTION**  
**TO ALTER TEMPORAL SCOPE OF DISCOVERY—**  
**EXPEDITED CONSIDERATION REQUESTED**

Defendants Cargill, Inc. and Cargill Turkey Production, LLC (“the Cargill Defendants”) hereby move the Court for permission to file a brief surreply in response to Plaintiffs’ Cargill-specific reply in support of Plaintiffs’ Motion to Expand the Discovery Period. (Mot. at Dkt. No. 1418; Reply at Dkt. No. 1668.) In support of this motion, the Cargill Defendants state as follows:

1. Many of the statements contained in Plaintiffs’ Reply Memorandum do not accurately reflect the record in this case and require correction. The Reply also makes a number of brand new allegations (including accusations of improper conduct) that are simply untrue, and likewise require response on the record. The Cargill Defendants respectfully submit that oral argument alone cannot fully accomplish these responses and cannot adequately supplement the record. Under these circumstances, a surreply is an

appropriate means to provide the Court with a full and accurate record for the resolution of this motion and to respond to Plaintiffs' accusations.

2. For example, Plaintiffs mistakenly represent that the Cargill Defendants have produced full historical grower files *only* for those growers who were active in 2002 or later. (Dkt. No. 1668 at ¶ 2.) Although the Cargill Defendants initially produced files for turkey growers active since 2002, the Cargill Defendants have subsequently identified and produced by agreement historical turkey grower files for IRW turkey growers *regardless* of when those growers contracted with one of the Cargill Defendants. The Cargill Defendants thought they had made the record plain on this point, but Plaintiffs' response makes clear that further clarification is needed.

3. The Cargill Defendants' surreply would also correct Plaintiffs' statements pertaining to the parties' agreement of summer 2007. In a nutshell, the surreply would establish on the record:

- a. That in the summer of 2007, the Cargill Defendants asked Plaintiffs' attorneys to identify the categories of discovery in which Plaintiffs sought pre-2002 information and the reasons they sought it;
- b. When Plaintiffs attorneys identified such categories, the Cargill Defendants did not dispute *any* of the categories but instead undertook to produce *all* responsive materials in those categories without time limitation;
- c. Following production of a substantial portion of this material, the Cargill Defendants asked Plaintiffs' attorneys whether Plaintiffs would

seek to identify any further categories of documents for pre-2002 disclosure;

- d. Plaintiffs attorneys never identified any further categories; and
- e. The first notice the Cargill Defendants had of Plaintiffs' desire for any further pre-2002 information was the filing of the present motion.

Thus, Plaintiffs completely failed either to follow the Court's directions for resolving the scope-of-discovery issue or to otherwise meet and confer with the Cargill Defendants before forging ahead with the present motion.

4. In addition, the Cargill Defendants' surreply would show that the circumstances surrounding the Cargill Defendants' hard copy production of documents pursuant to the summer of 2007 agreement have changed since Plaintiffs' original motion. The Cargill Defendants collected a supplemental set of documents pursuant to the summer 2007 agreement. In connection with recent negotiations over the Cargill Defendants' Rule 30(b)(6) designees, the Cargill Defendants have provided to Plaintiffs an index describing the contents of those documents and have offered Plaintiffs' attorneys open access (conditioned on certain non-waiver agreements) to the boxes. Plaintiffs have not yet responded to this offer. A surreply would permit the Cargill Defendants to complete the record on these issues and would inform the Court of the most current status of the parties' dispute.

5. The Cargill Defendants also need a surreply to respond to Plaintiffs' accusation that the Cargill Defendants have "improperly withheld" these documents. Plaintiffs unexpectedly abandoned the parties' agreed procedure for addressing Plaintiffs'

claimed need for pre-2002 information and, without meeting or conferring with the Cargill Defendants on the issue, brought the present motion to expand the scope of discovery. Once Plaintiffs brought that motion, the Cargill Defendants determined that the only sensible approach was to wait until the Court rules on Plaintiffs' request to expand the scope of discovery and *then* to conduct the document review under whatever standard the Court adopts. Indeed, Plaintiffs themselves are no stranger to this approach, and have themselves frequently sought extensions of their discovery obligations until the Court resolves disputes over the scope of those obligations. (See, e.g., Dkt. Nos. 1487, 1617, 1660, and 1663 (all relating to Plaintiffs' requests to postpone complying with the Court's privilege rulings, to which Plaintiffs have filed objections.)) Plaintiffs' suggestion that the Cargill Defendants' approach is "improper" is at the very least inconsistent, and the Cargill Defendants should be permitted to respond.

6. Finally, the Cargill Defendants urge the Court to permit them a surreply to refute Plaintiffs' new and wholly speculative suggestion that the substantially broadened discovery Plaintiffs propose will not unfairly burden or impose unjustified costs on the Cargill Defendants. Indeed, common sense dictates that a revision in the scope of discovery at this late date will require the Cargill Defendants to essentially repeat the huge and expensive document review they performed last fall, a review based on the Court's existing Order and the Plaintiffs' silence on any desire for any pre-2002 information beyond what they had already identified. The Cargill Defendants have already spent nearly \$2 million in responding to Plaintiffs' discovery requests under the existing standard, and expect to submit with a surreply brief an estimate the additional

costs that they would suffer should the Court grant Plaintiffs' belated request to expand the scope of discovery.

7. The Cargill Defendants' objections to the scope of Plaintiffs' discovery requests are not "frivolous temporal objections," as Plaintiffs claim. (Dkt. No. 1668 at 6.) On the contrary, the Court upheld these "frivolous" objections. (Dkt. No. 1207.) The Cargill Defendants believe the Court's original compromise decision was sound, and believe a surreply would aid the Court in its review of that decision.

8. For the reasons stated above, the Cargill Defendants ask the Court's leave to file a surreply brief and accompanying affidavits responsive to Plaintiffs' new allegations and arguments. The underlying motion is presently scheduled for hearing on May 6, 2008 before Magistrate Judge Joyner. The Cargill Defendants would submit their surreply within five days of the order granting leave, still well before the scheduled hearing.

9. The Cargill Defendants' attorneys have consulted with Plaintiffs' attorneys concerning this motion and have been informed by that Plaintiffs object to the proposed surreply.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I certify that on the 25th day of April, 2008, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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